United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7686

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P/s

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FOR THE SECOND CIRCUIT

CHAS. KURZ & CO.,
Owners of the S/S BENNINGTON,

Petitioner-Appellee,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Respondent-Appellant.

APPELLANT'S REPLY BRIEF

MENDES & MOUNT
Attorneys for Respondent-Appellant
27 William Street
New York, N. Y. 10005
344-7100

JOHN J. SULLIVAN, Esq.,
Of Counsel.

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The "Question on Appeal" is not, as suggested by appellee, whether the court shall review, on its merits, an arbitration award, but rather, an award that discloses, on its face, grounds for vacating such award.

The Facts

Although the "Facts", per se, are of significance only as background, and are not pertinent to a claim directed to errors apparent on the face of the Award, nevertheless, if facts are to be stated, they should be stated accurately.

This holds particularly true to the facts of the BENNINGTON encountering and proceeding through ice conditions, which, as noted in the arbitrator's Award, were the "worst" the pilot had seen, (14 A), to the loading platform at Drift River. Appellee states "when the BENNINGTON had passed through ice into open water the master and pilot testified that they discussed continuing further or returning to the

pilot station", (Appellee's Brief, at 3). As to passing "into open water", the arbitrators noted "the ice was less packed", (12 A), presumably on the basis of the pilot's testimony that the ice became "less packed" but "still no clear water", (39 A), and statements prepared by the ship's officers that the ice "conditions was constant right up to the time the vessel docked" and the "ice conditions were very heavy and it was very difficult docking the vessel", (39 A). Further, as noted in the Award, the pilot and master discussed turning back, not when the BENNINGTON had "passed through the ice", but as noted in the Award, "when they were well into the ice on the way up", (13 A), as testified by the pilot, (36 A). The master did not call the loading platform after the BENNINGTON has passed through the ice, (Appellee's Brief, at 3), but as noted in the Award, "the ice was increasing and the master contacted the Drift River platform as they approached Harriet Point", (12 A), as testified by the pilot, (35 A). In summary, the presence of heavy ice conditions was constant throughout, and, as the BENNINGTON forced its way up to and at the loading platform, was there to be observed without resorting to advices from the Coast Guard, other pilots or the platform.

As noted by appellee, (Appellee's Brief, at 4), the pilot photographed conditions encountered on arrival at the loading platform and during mooring. Omitted is the pilot's commentary as to "larger pans around the vessel", "moving through ice" and "no open water" (40 A).

Appellee's Point I

Appellee's Point I boils down to the proposition that an arbitration Award will not be vacated because of an erroneous "interpretation" of a contract, and that misconstruing a contract is not a "manifest disregard" of the law.

It is appellant's contention that there is here involved, not a misinterpretation of the contract, but a change by arbitrators of the terms of the contract, and that, apart from the contract or charter party, there has been a manifest disregard of the law evident on the face of the Award. Appellant further contends that, as to the Award, arbitrators precluded the charterer from offering material evidence on a controlling issue.

Appellee lays particular stress on *I/S STAGBORG* v. *National Metal Converters Inc.*, 500 F.2d 420 (2d Cir. 1974), emphasizing the portion of the court's opinion that states:

> We see no basis, however, to reverse the award even though it is based on a clearly erroneous *interpretation* of the contract. Whatever arbitrators mistakes of law may be corrected, simple *misinterpretations* of contracts do not appear to be one of them. *Id.* at 432. (Emphasis Added) (Appellee's Brief, at 9).

Appellant's objection to the Award, however, is not that the arbitrators "misinterpreted" the contract, but that they changed the contract, and the courts have recognized that distinction. In *Timken Co.* v. *Local U. No. 1123, United Steelworkers of Am.*, 482 F.2d 1012 (6th Cir. 1973), the court stated at page 1015:

> A collective bargaining agreement is after all a contract and the arbitrator is limited to the *interpretation* and application of that contract. (Emphasis Added).

In footnote 2, at page 1015, it is stated:

> It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense "his own brand of industrial justice", the enforcement of the award must be denied.

In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 591, 80 S. Ct. 1358 (1960), the court stated:

> . . . nevertheless an arbitrator is confined to *interpretation* and application of the collective bargaining agreement . . . When the arbitrators' words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award. (Emphasis Added).

In *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 362 F.2d 677 (2d Cir. 1966), the court considered an appeal presenting the question whether an arbitrator exceeded his authority under a collective bargaining agreement in ruling that the agreement contained an "implied provision". In confirming the decision of the District Court, the Circuit Court noted:

> The District Court for the District of Connecticut held that "the arbitrator exceeded and abused his authority when he attempted to read into the agreement this *implied* contractual relationship", and it vacated and set aside the arbitrators award. (Emphasis Added). *Id.* at 678.

In like manner, arbitrators have exceeded their authority in implying a condition to the contract at variance with the specific language contained therein.

Two questions were considered by the court in *I/S STAGBORG* as to the arbitration award reviewed therein, i.e., whether the award "manifestly disregards the law", or is "irrational". In appellee's brief, the court's opinion as to the former is dwelt on. However the court concluded, at page 431:

> . . . for even though erroneous the arbitral majority here was not irrationally so,

and refers back to Footnote 12, at 500 F.2d 424, 430. That footnote considers *Marcy Lee Manufacturing Co.* v. *Cortley Fabrics Co.*, 354 F.2d 42 (2d Cir. 1965) as follows:

> The Marcy court essentially quoted the New York Court of Appeals decision in In re Exercycle Corp., 9 N.Y. 2d 329, 336-337, 214 N.Y.S.2d 353, 357-358, 174 N.E.2d 463, 466 (1961). That decision in turn relied for its "irrationality" proposition on In re National Cash Register Co., 8 N.Y.2d 377, 383, 208 N.Y.S.2d 951, 955, 171 N.E.2d 302, 305 (1960), where the Court of Appeals said that arbitrators may be said to have *"exceeded their powers"* under §1462(4) of the New York Civil Practice Act "only if they gave a completely irrational construction to the provisions in dispute *and, in effect, made a new contract for the parties."* The language of 9 U.S.C. §10(d) tracks the language of §1462(4) exactly. (Emphasis Added).

This is precisely the point. The arbitrators "made a new contract for the parties" by adding terms they "felt" were "implied". The effect was that the arbitrators "exceeded their powers" under 9 U.S.C. Section 10(d):

> In either of the following cases, the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration.
>
> * * * * *
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In implying terms at variance with the provision of the charter party, the arbitrators "exceeded their powers", without reference as to whether this constituted a "manifest disregard" of the law.

As to the application of the "manifest disregard" standard, the court noted in *I/S STAGBORG,* referring to *Bernhardt* v. *Polygraphic Co. of America,* 350 U.S. 198, 76 S. Ct. 273 (1956), at page 431:

> In Bernhardt, the Court negated the possibility of applying a nonstatutory, "manifest disregard" standard to a case like the one before us when it stated, citing this court's own decision in The Hartbridge, 62 F.2d 72 (1932), cert. denied, 288 U.S. 601, 53 S.Ct. 320, 77 L.Ed. 977 (1933), that "Whether the arbitrators misconstrued a contract is not open to judicial review." Bernhardt v. Polygraphic Co. of America, 350 U.S. at 203 n.4.

I/S STAGBORG Case is authority that misconstruing a contract is not "manifest disregard" of the law, but is not authority for failing to apply the "manifest disregard" standard where, under the circumstances here present, a recovery was awarded for ice damage sustained on the outward voyage. *San Martine Compania de Navegacion S.A. v. Saguenay Terminals Limited,* 293 F.2d 796 (9th Cir. 1961) cited by appellee (Appellee's Brief, at 11), acknowledges the "manifest disregard of law" proposition as being "undue means" within the meaning of 9 U.S.C. Section 10(a), or "partiality" within the meaning of 9 U.S.C. Section 10(b). *San Martine Compania,* supra at 801.

Having exhausted other sources, appellee's counsel cites himself as authority, *R. H. Sommer, Maritime Arbitration —Some of the Legal Aspects,* 49 Tulane L. Rev. 1035 (1975), for the propositions stated in appellee's brief,

again in support of points not directed to appellant's contentions that arbitrators have improperly changed the terms of the charter party and have shown a manifest disregard of the law on the face of the Award.

Otherwise, appellee offers no authority bearing on arbitrators having precluded charterer from offering material evidence on a controlling issue.

Appellee's Point II

In Point II, appellee comments on appellant's specific contentions (Appellee's Brief, at 12-17).

As to arbitrators implying conditions to the Ice Clause of the charter party, appellee argues that "arbitrators were setting a standard of conduct by which the master should exercise his own judgment under the Ice Clause", Point II, Paragraph 1, (Appellee's Brief, at 13). It is not clear how appellee can speculate on what arbitrators were trying to do, or by what right arbitrators are "setting a standard of conduct". It is clear, however, what arbitrators did do. Appellees labored logic points up nothing more than that, by implying the condition to the respective rights and obligations spelled out in the charter party, in the event, as was anticipated, the vessel encountered ice, the door is opened to endless dispute as to whether it would be "practical" to proceed. In spelling out the options, the specific terms of the Ice Clause precluded this. Arbitrators have introduced a completely different factor, and have thereby changed the contract to arrive at a result at complete variance with the conditions expressed therein.

As to Point II, paragraph 2, (Appellee's Brief, at 13 & 14), appellee seems to argue that appellant should have, in some way, anticipated that arbitrators would introduce,

for the first time in the Award, a controlling issue as to whether it was "practical" to proceed into Drift River, and should have examined the witnesses beforehand as to this issue. If this were correct, appellee is right. If this is not correct, arbitrators have successfully precluded appellant from offering evidence on a controlling issue. The court may vacate an award:

> Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . 9 U.S.C. Section 10(c).

As to Point II, paragraph 3, (Appellant's Brief, at 14), arbitrators stated, as a legal conclusion, that charterer was liable since the berth was unsafe, and then, in manifest disregard of the law as stated, awarded damages sustained by the vessel during the return trip, in no way related to conditions at the berth. Appellee proposes that inasmuch as the vessel was now departing through the same extreme ice conditions encountered when the vessel forced its way up Drift River, charterer now becomes responsible. The arbitrators held charterer liable for conditions at the berth, and nothing more.

As to Point II, paragraph 4, (Appellee's Brief, at 15), appellee states arbitrators determined "that the master was well aware that he could have refused to proceed to Christie Lee". However, this is not directed to this issue. The master did proceed to Christie Lee, but in doing so, he did not rely on the charter party or Safe Berth warranty contained therein. He didn't know of it. This is conceded by the arbitrators.

As to the failure of the arbitrators to render an award within the time specified under the Rules of the Society of Maritime Arbitrators (56 A), the appellee states in Point II, paragraph 5, (Appellee's Brief):

> . . . the last "evidence, transcript or brief" was a letter dated March 7, 1975 (86 A, 87 A) from appellant to the panel arguing against evidence contained in the letter of appellee's counsel dated February 27, 1975, (94 A, 95 A, 96 A). (Appellee's Brief, at 16).

The arbitrators stated in their Award:

> The defense did not present any witnesses or *evidence*. (Emphasis Added) (11 A).

The exchange of letters between counsel, following the submission of final briefs, in no way affects the obligation assumed by arbitrators to render an award "in no case later than 90 days from the receipt by arbitrators of the last evidence, transcript or brief . . .", (56 A). Arbitrators were in receipt of the "last evidence" at the time of the final hearing on December 17, 1974, and the last "transcript" shortly thereafter. At the time of the final hearing, arbitrators set forth the conditions for the submission of briefs and answering briefs by attorneys for the respective parties. This was done- the last "brief" was submitted on or about February 25, 1975. Then, on February 27, 1975, counsel for owner sent an unsolicited letter to the arbitrators, (94 A), and attorneys for the charterers responded thereto, noting that the "arbitration apparently has proceeded from the brief writing stage to the letter writing stage . . ." (86 A, 87 A). The time for arbitrators to render their award commenced to run when the last brief was submitted. The applicable rules make no provision for a "last letter". If they did, anyone could keep open the time for the rendering of an award through all eternity by the simple device of writing an unsolicited letter to the arbitrators.

As to the "waiver" of the time provision argued by appellee, arbitrators had set a meeting for April 29, 1975,

but in view of one of the arbitrator's illness, inquired if counsel would "waive the time provision in the rules of the Society", (60 A). Counsel for appellant advised they were sorry to hear of the arbitrator's illnesss, and were "prepared" to waive the time provision, (61 A). However, the arbitrators were able to meet on April 29, 1975, as scheduled, and there was no waiver of the time provisions of the applicable rules.

In Point II, paragraph 6, (Appellee's Brief, at 16, 17), appellee argues the burden was on appellant at the time of the hearing to establish the arbitrators had prior knowledge bearing on the dispute. On the contrary, the applicable rules provide:

> . . . a prospective arbitrator is required to disclose any circumstance tending to raise a presumption of bias or which he believes which might disqualify him as an impartial arbitrator . . . (51 A).

Appellee notes the Achilles Award, (*Newport Tankers Corp.* v. *Philips Petroleum Co.*, 1972 A.M.C. 1870, 1973 A.M.C. 666), was rendered on September 29, 1971. Appellant is not concerned as to when it was rendered, but rather, that the arbitrators thereby acquired prior knowledge bearing on the present dispute.

Appellee's Point III

There would be no question of a "safe berth" if the master of the BENNINGTON wasn't where he didn't belong. The BENNINGTON took a battering proceeding 50 miles through heavy ice and put in at the berth under similar conditions. It was one big "ball of wax". Arbitrators have made a nice distinction where, by changing the contract, they have held the vessel is to go through ice "if it seems

practical", and then, having sneaked the vessel 50 miles through heavy ice to the loading platform, conclude that the ice there present renders the berth unsafe and charterer liable. No violation of the Safe Berth warranty could be possible unless the effect of the Ice Clause were compromised by implying the condition at variance with the terms of that clause.

The provisions of the charter party reflect a clear intent to cover precisely the situation here involved. The possibility of encountering ice conditions was contemplated and provided for in the "Ice Clause", and specifically, as to such conditions at Drift River. In the *J. G. Grammer* 1930 AMC 952 (W.D.N.Y. 1929) the court stated, at page 957:

> The lateness of the season permits the inference that the contracting parties were aware of the possible difficulties and perils . . ., the risks, uncertainties, and probabilities from freezing up of channels doubtless were in the minds of parties at the time of chartering the Grammer.

The charter party made clear that under such conditions, the decision as to whether or not to proceed in is determined by the judgment of the master. Not to give effect to the clause required a complete distortion of the clear intent of the parties. In *The Coeur D'Alene,* 1925 AMC 1590 (3d Cir. 1925) the master of a chartered vessel refused to dock on account of ice. The charter party contained an ice clause, and the court held "that it was within the right of this vessel after arriving and reporting . . . and finding itself absolutely balked by ice to throw up the charter". *Id.* at 1592.

In a New York arbitration, *The Advance—The Parma,* 1956 AMC 1776, the discussion of the claim on the steam-

ship PARMA is pertinent. There, claim was made for ice damage on a voyage to the Bay of Fundy under a charter party that contained an "Ice Clause". The arbitrators noted that in the Bay of Fundy "the formation of ice . . . takes place, and floating ice is very prevalent, posing a definite risk to navigation".

The arbitrators noted:

> The master of the PARMA could have brought this matter to Charterers' attention, and again, here making agreement that for any ice damages suffered by his vessel, he would hold charterers responsible. *He also, however, did not take any advantage of his charter conditions, and proceeded to loading port, Hantsport, in ballast, without any protest.* While in the course of trying to reach Hantsport, he encountered broken ice and bad weather conditions, which made it risky for him to reach the port of Hantsport. Only then, did he protest to Charterers that he would hold them responsible for ice damages, if any, but he did not get Charterers' agreement that they would pay for such ice damages. Failing to get such an agreement, then to notify Charterers that he would abandon the voyage and wait their further instructions at a safe place.
>
> Regardless of the foregoing, the Master persisted in going through ice to make Hantsport which he finally did. His vessel also received certain ice damages.
>
> *It is the opinion of the Arbitrators that the Masters of these vessels did not exercise due diligence and precaution in assuming the risk of proceeding on these voyages without due regard to the two clauses in the charter parties referred to above, and in so doing, voided any claims for ice damages with no recourse of Charterers.* (Emphasis Added).

In like manner, the master of the PENNINGTON acted without due regard to the "Ice Clause" of the Charter Party.

The qualification to the Ice Clause implied by arbitrators is a complete distortion of the clear language contained therein.

CONCLUSION

Appellee has not disposed of the grounds for vacating the Award evident on the face of the Award.

Respectfully submitted,

MENDES & MOUNT
Attorneys for Respondent-Appellant

JOHN J. SULLIVAN, Esq.,
Of Counsel.

Lex Printing Co., Inc., 451 Greenwich St., N.Y. 10013—966-4300